

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION CORPORATION,  Plaintiff-Applicant,  v.  BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (SMB)  SIPA Liquidation  (Substantively Consolidated)
In re:  BERNARD L. MADOFF,  Debtor.	
IRVING H. PICARD, Trustee for the substantively consolidated Liquidation of Bernard L. Madoff Investment Securities LLC and the Estate of Bernard L. Madoff  Plaintiff,  v.  DEFENDANTS LISTED ON EXHIBIT A ATTACHED HERETO,  Defendants.	Adv. Pro. Nos. listed on Exhibit A Attached Hereto

**JOINT MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ENTRY OF  
FINAL JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 54(b)**

Irving H. Picard (the “Trustee”), as trustee of the substantively consolidated estate of Bernard L. Madoff Investment Securities LLC (“BLMIS”) under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, *et seq.* (“SIPA”), and the estate of Bernard L. Madoff, individually, together with the defendants in the adversary proceedings (the “Adversary Proceedings”) listed on Exhibit A attached hereto (the “Defendants,” and together with the

Trustee, the “Parties”<sup>1</sup>), respectfully submit this memorandum of law in support of the Parties’ Joint Motion for Entry of Final Judgment Pursuant to Federal Rule of Civil Procedure 54(b) (the “Motion”), which seeks this Court’s entry of final judgment of the Dismissed Claims (as defined below) pursuant to Federal Rule of Civil Procedure 54(b),<sup>2</sup> and an express determination that there is no just cause for delay.<sup>3</sup>

### **PRELIMINARY STATEMENT**

On November 22, 2016, this Court entered the Memorandum Decision Regarding Claims to Recover Foreign Subsequent Transfers (the “Memorandum Decision”), directing, among other things, dismissal of certain of the Trustee’s claims seeking recovery of subsequent transfers of BLMIS customer property under Bankruptcy Code section 550(a)(2). *See SIPC v. BLMIS (In re Madoff)*, No. 08-01789 (SMB), 2016 WL 6900689 (Bankr. S.D.N.Y. Nov 22, 2016).

The Memorandum Decision directs parties to settle orders in 91 adversary proceedings.<sup>4</sup> Entry of the proposed orders will result in dismissal of all claims against all parties in 74 of the 91 adversary proceedings (the “Finally Determined Proceedings”). Furthermore, this Court directed dismissal of less than all claims and parties in 17 proceedings (the “Dismissed Claims”).

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<sup>1</sup> All but one defendant in the 17 cases identified on Exhibit A affirmatively join in the Motion. Zephyros Limited, defendant in *Picard v. Zephyros Limited*, No. 10-01278, does not oppose the Motion, but does not affirmatively join.

<sup>2</sup> Made applicable to the Adversary Proceedings through Federal Rule of Bankruptcy Procedure 7054.

<sup>3</sup> If the Court denies the Motion, the Trustee fully reserves his right to seek interlocutory appeal in the Adversary Proceedings under 28 U.S.C. § 158(a)(3) or 158(d).

<sup>4</sup> The 91 adversary proceedings accounts for parties joined pursuant to this Court’s entry of the So Ordered Stipulations Applying Omnibus Extraterritoriality Briefing and Memorandum Decision to Certain Joinder Defendants (ECF Nos. 14890 and 14915), as well as the Trustee’s voluntary dismissal of one adversary proceeding subject to the Memorandum Decision.

This Motion addresses the 17 adversary proceedings involving the Dismissed Claims. The Parties to the Motion have conferred pursuant to the Memorandum Decision, and request:<sup>5</sup> (1) a final judgment under Rule 54(b) as to the Dismissed Claims;<sup>6</sup> (2) a finding by this Court that there is no just reason for delay of entry of final judgment as to the Dismissed Claims; and (3) entry of an order in each adversary proceeding identified on Exhibit A, in the form attached hereto in Exhibits D,<sup>7</sup> E, F, and G.<sup>8</sup>

Entry of final judgment as to the Dismissed Claims will permit the Trustee to seek immediate appellate review by the Second Circuit, if authorized,<sup>9</sup> of the Memorandum Decision and the conclusions of law set forth in the Opinion and Order dated July 6, 2014 of the District Court (the “District Court Decision”) in the 17 adversary proceedings.<sup>10</sup> This procedure will facilitate concurrent appeals in all of the adversary proceedings affected by the Memorandum Decision.

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<sup>5</sup> The Parties further incorporate by reference the Letter dated January 17, 2017 (ECF No. 14858), which requests that, if the Court denies the Motion, the Parties shall have seven days following the Court’s ruling to submit proposed consensual orders consistent with the Memorandum Decision.

<sup>6</sup> The Defendants have expressly consented to the Bankruptcy Court’s entry of a final judgment for the purposes of the Dismissed Claims, which is set forth in each proposed final order, attached hereto as Exhibits D through G. Notwithstanding Defendants’ consent, Defendants reserve all other jurisdictional, substantive, or procedural rights and remedies in connection with these adversary proceedings, including with respect to the Bankruptcy Court’s power to finally determine any other matters in these adversary proceedings.

<sup>7</sup> Exhibit D is comprised of proposed consensual orders being submitted in 14 of the 17 adversary proceedings included in this Motion.

<sup>8</sup> The Trustee and defendants in *Picard v. Fairfield Investment Fund Ltd.* (No. 09-01239), *Picard v. Safehand Investments* (No. 12-01701), and *Picard v. Barreneche Inc.* (No. 12-01702) (collectively, the “Fairfield Proceedings”) were unable to agree as to the form of the proposed orders settling the Memorandum Decision. The Trustee’s proposed orders are attached hereto as Exhibits E-1, F-1, and G-1 (the “Trustee’s Proposed Fairfield Orders”), and a chart summarizing the active and dismissed claims pursuant to the Trustee’s Proposed Fairfield Orders is attached hereto as Exhibit C-1. The defendants’ proposed orders are attached hereto as Exhibits E-2, F-2, and G-2 (“Defendants’ Proposed Fairfield Orders”), and a chart summarizing the active and dismissed claims pursuant to the Defendants’ Proposed Fairfield Orders is attached hereto as Exhibit C-2. Concurrent with the filing of this Motion, the defendants in the Fairfield Proceedings will submit a letter to this Court detailing the basis for entry of the Defendants’ Proposed Fairfield Orders. The Trustee will respond with his objections and the basis for entry of the Trustee’s Proposed Fairfield Orders, in accordance with Local Bankruptcy Rule 9074-1.

<sup>9</sup> The Parties have met and conferred, and anticipate the filing of a certification pursuant to 28 U.S.C. § 158(d)(2)(A)(iii) for direct appeal to the Second Circuit.

<sup>10</sup> *SIPC v. BLMIS (In re Madoff Secs. LLC)*, 513 B.R. 222 (S.D.N.Y. 2014).

## **ARGUMENT**

### **I. Legal Standard for Entry of a Final Judgment Under Rule 54(b)**

Certification under Rule 54(b) is appropriate when (1) there are multiple claims or multiple parties; (2) at least one claim is finally decided within the meaning of 28 U.S.C. § 1291; and (3) an express determination is made that there is no just reason for delay. *See In re Air Crash at Belle Harbor, N.Y.*, 490 F.3d 99, 108–09 (2d Cir. 2007).<sup>11</sup> A court may enter a final judgment even though the judgment would dispose of fewer than all claims or would dispose of all claims against fewer than all of the parties. *See Shrader v. Granninger*, 870 F.2d 874, 878 (2d Cir. 1989) (citing *Cullen v. Margiotta*, 811 F.2d 698, 710 (2d Cir. 1987)). Certification under Rule 54(b) may be granted in the interest of “sound judicial administration.” *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980). A decision to enter final judgment lies within the sound discretion of the court. *Id.* at 10. The Court should exercise such discretion here.

### **II. The Court Should Direct Entry of Final Judgment as to the Dismissed Claims Because Each Prong of Rule 54(b) is Satisfied**

#### **a. There are multiple claims against multiple parties**

When considering whether to enter partial final judgment on the dismissal of some, but not all, claims, the court must find that the dismissed claims are separable from those that remain. *See Nippon Yusen Kaisha v. FIL Lines USA*, 977 F. Supp. 2d 343, 352 (S.D.N.Y. 2013). Claims are separable for purposes of Rule 54(b) if they “can be decided independently of each other.” *Ginett v. Computer Task Grp.*, 962 F.2d 1095, 1097 (2d Cir. 1992) (quoting *Sears, Roebuck & Co. v. Mackey*, 76 S. Ct. 895, 900 (1956)); *see also Nippon Yusen Kaisha*, 977 F.

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<sup>11</sup> Federal Rule of Civil Procedure 54(b) provides in pertinent part: “When an action presents more than one claim for relief . . . or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.”

Supp. 2d at 352–53 (separate claims must involve “at least some different questions of fact and law and could be separately enforced”). The Dismissed Claims are each part of adversary proceedings involving multiple parties and/or multiple claims. *See* Exhibits B and C.<sup>12</sup> The 17 adversary proceedings covered by the Motion generally fall within two categories.

In some cases, the Trustee asserted multiple claims against multiple parties seeking avoidance and recovery of both initial transfers, as well as recovery of subsequent transfers.<sup>13</sup> In these cases, the Trustee’s claims for avoidance and recovery of the initial transfers are distinct from his claims for the recovery of the subsequent transfers that were dismissed pursuant to the Memorandum Decision. Even though Bankruptcy Code § 550(d) limits the Trustee’s total recovery of transfers, initial or subsequent, the legal theories and facts to prevail on a subsequent transfer claim *are in addition to* the elements the Trustee would need to prove to avoid and recover an initial transfer under Bankruptcy Code §§ 548(a) and 550(a)(1).

Other cases involve multiple claims against one or more parties seeking recovery of subsequent transfers and other forms of relief,<sup>14</sup> including, in one instance, disallowance of customer claims.<sup>15</sup> In these cases, the Trustee sought recovery of subsequent transfers originating with initial transferee feeder funds. For example, certain defendants in these cases received transfers from the “Fairfield Funds” (defined in the Memorandum Decision as Fairfield Sentry Limited, Fairfield Sigma Limited, and Fairfield Lambda Limited) and one of the “Rye

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<sup>12</sup> Exhibit B summarizes the active and dismissed claims in the 14 adversary proceedings with orders submitted on consent. *See supra* note 7 for discussion of Exhibits C-1 and C-2, for the Fairfield Proceedings.

<sup>13</sup> *E.g.*, *Picard v. Ceretti*, No. 09-01161; *Picard v. HSBC Bank, plc*, No. 09-01364; *Picard v. UBS AG*, No. 10-04285; *Picard v. UBS AG*, No. 10-05311; *Picard v. Oréades SICAV*, No. 10-05120.

<sup>14</sup> *E.g.*, *Picard v. Fairfield Investment Fund Ltd.*, No. 09-01239; *Picard v. Natixis S.A.*, No. 10-05353; *Picard v. Zephyros Ltd.*, No. 10-01278; *Picard v. BNP Paribas S.A.*, No. 12-01576; *Picard v. Banque Internationale à Luxembourg S.A.*, No. 12-01698; *Picard v. Royal Bank of Canada*, No. 12-01699; *Picard v. Safeland Investments*, No. 12-01701; *Picard v. Barreneche, Inc.*, No. 12-01702; *Picard v. ABN AMRO Bank (Ireland) Ltd.*, No. 10-05355; *Picard v. Cardinal Management*, No. 10-04287; *Picard v. Citibank, N.A.*, No. 10-05345.

<sup>15</sup> *Picard v. Banque Syz & Co., S.A.*, No. 11-02149.

Delaware Funds” (defined in the Memorandum Decision as Rye Broad Market Fund L.P., Rye Select Broad Market XL Fund L.P., and Rye Select Broad Market Prime Fund L.P.). In these cases, the Trustee’s claims seeking recovery of subsequent transfers that originated with the Fairfield Funds were dismissed,<sup>16</sup> while the Trustee’s claims seeking recovery of subsequent transfers that originated with the Rye Delaware Funds were not dismissed pursuant to the Memorandum Decision.<sup>17</sup> The facts and circumstances underlying the transfers from the Fairfield Funds and the Rye Delaware Funds are sufficiently distinct to make these claims separable for purposes of Rule 54(b).

In sum, all of the Dismissed Claims are separable because the legal theories and pertinent facts upon which the Trustee based his claims are distinct. *See Cullen*, 811 F.2d at 711 (claims “may be considered separable even if they have arisen out of the same transaction or occurrence”); *see also In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, No. 00-mdl-1898, 2010 WL 1328249, at \*2 (S.D.N.Y. Apr. 5, 2010); *cf. Hirsch v. Gersten (In re Centennial Textiles, Inc.)*, 220 B.R. 177, 181 (Bankr. S.D.N.Y. 1998) (intentional fraudulent transfer claims separable from constructive fraudulent transfers).

**b. At least one claim in every case has been finally determined**

The second prong of Rule 54(b) requires that each claim sought to be appealed be finally determined within the meaning of 28 U.S.C. § 1291. *See Ginett*, 962 F.2d at 1092 (“If the decision ends the litigation [of that claim] on the merits and leaves nothing for the court to do but execute the judgment entered on that claim, then the decision is final”) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978)). Here, the Memorandum Decision granted the Extraterritoriality Motion to Dismiss with respect to each Dismissed Claim and denied the

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<sup>16</sup> *Memorandum Decision*, 2016 WL 6900689, at \*15.

<sup>17</sup> *Memorandum Decision*, 2016 WL 6900689, at \*29–30.

Trustee leave to amend, effectively terminating the Trustee's rights with respect to the Dismissed Claims. Such dismissal amounts to the type of "final" judgment that meets the test for finality required by Rule 54(b). *See Naughtright v. Weiss*, No. 10-cv-8541 (RWS), 2013 WL 1859221, at \*2 (S.D.N.Y. May 2, 2013) ("dismissal with prejudice pursuant to Rule 12(b)(6) is a final decision and judgment on the merits" for purposes of Rule 54(b)).

**c. There is no just reason to delay entry of final judgment on the Dismissed Claims**

The Second Circuit has held that certification is appropriate where an appeal can be taken "without delaying prosecution of the surviving claims [and] a dismissed claim [could be] reversed in time to be tried with the other claims." *Cullen*, 811 F.2d at 711.

Immediate entry of final judgment as to the Dismissed Claims is warranted to avoid delay of resolution of the Dismissed Claims, which can be resolved with the Trustee's appeal of the Memorandum Decision as to the Finally Determined Proceedings. These cases were briefed and argued on an omnibus basis before both the District Court and the Bankruptcy Court, and the parties seek to structure the appeal similarly. In deciding whether to exercise its discretion, the court should consider the efficiency interests of the trial and appellate courts, as well as balance the equities as to the parties. *See Curtiss-Wright*, 446 U.S. at 8; *Ginett*, 962 F.2d at 1095–96.

The interests of judicial efficiency weigh in favor of entry of final judgment as to the Dismissed Claims. The appeal of the District Court Decision and the Memorandum Decision will be more comprehensive if all parties affected by those decisions present the issues on appeal together. Otherwise, the appeal will be piecemeal and further delay resolution of these cases, when all of the parties involved seek timely resolution of the disputes. *See, e.g., Trugman-Nash, Inc. v. N.Z. Dairy Bd., Milk Prods. Holdings (N. Am.) Inc.*, 954 F. Supp. 733, 738 (S.D.N.Y.

1997) (granting 54(b) certification would allow immediate appeal to determine if certain “claims form a proper part of this case, [as] a single trial of all claims is preferable”).

### **CONCLUSION**

Wherefore, the Parties respectfully request this Court grant their request and enter the proposed final orders, annexed as exhibits hereto, in each adversary proceeding identified on Exhibit A, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

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